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Changing Conceptions of Law and of Legal Institutions

THE greatest of modern poets and literary men, himself a lawyer and practical statesman, in the first part of Faust, expresses his conception of law in a dialogue between Mephistopheles and a student, in the following words:

STUDENT.

"I cannot reconcile myself to Jurisprudence.

MEPHISTOPHELES.

Nor can I greatly blame you students,

I know what science this has come to be,

All rights and laws are still transmitted

Like an eternal sickness of the race.

From generation unto generation fitted,

And shifted round from place to place.

Reason becomes a sham, beneficence a worry:

Thou art a grandchild, therefore woe to thee!

The right born with us, ours in verity,

This to consider, there's alas! no hurry."

From what Goethe tells us in his autobiographical sketch entitled "Truth and Fiction," his experience as a student of the law at Strassburg justified his characterization of the legal learning of his day and country. Law was conceived of by the practitioners and jurists of his time and nation as a system of rules to be memorized for practical use, with little appeal to reason, with no recourse to other fields of learning in the search for fructifying principles. So conceived, law may well be compared to "an eternal sickness of the race;" it is certainly not a subject worthy of the best powers of any self-respecting intellect, much less of a

*Address before the annual meeting of the California Bar Association, August 24, 1915.

master mind such as Goethe's. A theory of law which regards it as a sort of semi-inspired revelation contained in certain sacred books and not to be found outside of the covers of these books, which rejects reason and common sense in a blind worship of authority, which regards the rules of law as ends in themselves and not rather as means to the realization of justice, must fail of respect in our practical modern world.

There have been times in the world's history when law was so regarded. Professor Carlo Calisse, of the University of Pisa, in his "History of Italian Law," a portion of which has recently been translated and forms a part of the work entitled "A General Survey of Continental Legal History" in the Continental Legal History Series, published under the auspices of the Association of American Law Schools, has described the degeneration of the Roman law in the hands of the Italian lawyers of the twelfth and thirteenth centuries who succeeded the great restorers of the legal system, Irnerius, and Accursius. Professor Calisse writes:¹

"The outward signs of a decadence were not long in appearing. Lectures and treatises alike became so prolix that only a small topic could be treated in them. Seeking to avoid this dilemma, they confined their discourses to the easier topics, omitting those difficult ones which required too much time. The judgment of Cujas upon them, in after times, is full of truth: *Verbosi in re facili, in difficili muti, in angusta diffusi.*' They totally lacked literary culture; their style was common-place and their diction crude and harsh. . . . None of the other branches of learning were made use of. And the inherence of these traits in the very method itself is apparent when we find Cino of Pistoia, an accomplished poet, using in his law books a style as crude as that of any other jurist; or when we hear Baldus, one of the foremost jurists, advising the students to pay no attention to style or form of utterance Legal science was now a victim to the fetish of authority worship. The lecture, the forensic argument, the judicial decision, now consisted in little more than citing somebody's name and treatise Dogma and authority worship having superseded reason and science, it was now an easy step to the logical culmination of the system—the doctrine of "*communis opinio*" or weight of opinion; i. e. the rule that the recorded opinion which had the greater number of adherents was the sound one. To this rule the practitioners were ready enough to yield support;

¹A General Survey of Events, Sources, Persons and Movements in Continental Legal History, 143-4.

for it reduced their labor to that of ransacking from the books as many opinions as possible, regardless of their intrinsic value, and then marshalling them in court, like hostile battalions, for the judges' mechanical enumeration. And the schools of law, which still had their eyes entirely on the preparation of practitioners, followed suit; they contented themselves with the same dull round of repetitious citation of musty authorities, whose chief virtue was that their opinions were at least likely to be better than those of the lecturers of that day. . . . The story of the classic Roman law had offered an interesting parallel to this stage of legal science. There, too, when the produce of juristic thought had passed its prolific and brilliant stage, the solution of legal doubts was sought by the mere rule of thumb. By the law of citations the judge was to decide, not by aid of his own reasoning, but by following that opinion which numbered a majority of accredited names, and when the number was equal, Papinian's name controlled. There, too, it was a period of decadence; and the same effects are seen, a thousand years apart, recurring from the same causes. And," continues the learned modern Italian jurist whose words I quote, "herein is contained a lesson, by no means flattering, for us of today, when the same tendency is once more visible, to subordinate the living, active reason of the law to the mechanical counting of precedents."

The theory illustrated by the strange system of the medieval commentators and by the Roman law of citations is, of course, that there is a law existing in books which can be extracted from them by a mechanical process, without any serious intellectual exertion, other than the expenditure of considerable clerical labor. The painter of the early Renaissance who saw no anachronism in depicting Hector or Achilles in a suit of Florentine armor, was paralleled by the lawyer who found in the comments of Accursius upon the text of the Digest an authority greater than the original. The age that found its science completely stated for it by Aristotle and regarded whatever was not to be found in his pages as heresy, an age that conceived of Vergil not alone as a poet but as a prophet from whose pages one could learn one's future, might find nothing shocking in a conception of law that removed it wholly from the field of human interest and put it in the field of revelation. It is true that the great spirits in the new culture, Dante, Petrarch, and Boccaccio, saw the absurdity of this view as to the nature of law and criticized it with the same vigor as did Goethe at a later date. But it required the full daylight of the new humanism to banish the legal darkness of the now for-

gotten commentators. Literature and science were already well advanced before the so-called humanists in the fifteenth and sixteenth centuries succeeded in introducing into the method of jurisprudence the scholarship that had already done so much for other branches of learning,—the study of original sources, of the texts rather than the comments, in other words, the method of history.

What happened in the development of the Roman law and in that of modern continental Europe finds something of an analogy in the story of our own system. There have been periods in the history of the English law when it seemed likely to degenerate into formula worship, and our own Justice Holmes recently told us that "to rest upon a formula is a slumber that, prolonged, means death."² We need go no farther back in the history of English law than the early part of the reign of Queen Victoria to find illustration of the blind worship of form and precedent. A very great and learned judge, one of the most learned and subtle men that ever sat upon the bench, was James Parke, Baron of the Exchequer, later Lord Wensleydale of the House of Lords, known to his contemporaries and to history by the nickname of "Baron Surrebutter." In the case of *Regina v. Reed*,³ the defendant was charged with larceny for stealing coal from his employer. He had gone to the coal bunkers with his master's cart and then got coal for his employer, which he wrongfully sold to a third person and pocketed the proceeds. The majority of the court thought that by the placing of the coal in the master's cart, it was in the constructive possession of the latter, and therefore, Reed committed larceny when he took it, though if he had carried off the coal from the bunkers on his back he would not have been guilty. The report shows that Baron Parke, who was, when precedent was not involved, one of the hardest-headed and most logical of men, took no stock in so fine a distinction, when the case was argued. However, in the delivery of the opinion he concurred with the rest of the court upon the authority of a former case, *Spears' case*. He said:

"I certainly had differed from the view of this case which has been taken by Lord Campbell at a time when it was uncertain what the case of *Spears'* actually was, and treating this

² Ideals and Doubts, 10 Illinois Law Review, 1.

³ (1853), 6 Cox C. C. 284. Baron Parke's theory as to the binding effect of unreported cases is the prevailing English view; Pollock, *Essays in Jurisprudence and Ethics*, 244.

case as *res nova*. The book in which the opinions of the judges are written, and which is always in the custody of the Lord Chief Justice, was mislaid; and the case of John Spears was differently reported in the two editions of Leach, and also in East's Crown Law; and that case could not for a long time be found. However, since it has been found, I have satisfied myself, and I entertain no doubt upon it. I should have delivered my reasons at length; but it is unnecessary now to do so. The cases of *Rex v. Abrahath* and *Rex v. Spears* having been discovered, and having read that case with the explanation of Heath, J., I find the point decided; and though, therefore, if this were *res nova*, I should have pronounced an opinion that this was not larceny, yet as that case is a decided authority, by the authority of that case I am bound; and it is unnecessary for me to deliver my reasons at any greater length."

Think of the liberty or property of a man depending upon the accident whether or not the "Black Book," containing the manuscript decisions of the judges, could be found! The principle of *stare decisis* is one of the greatest importance for the welfare of society; if we did not have such a principle in our system we should be tossed upon a sea of uncertainty and doubt without a compass and without a chart. But the true basis of the doctrine is not that the courts pronounce inspired law, but that lawyers and business men and the community in general transact their affairs upon the belief that the courts will not recklessly disregard prior decisions, that such decisions become in a degree rules of conduct. The view entertained by Baron Parke of the nature of the rule of *stare decisis* is but a corollary of the conception of law which divorces it from all other branches of human learning and attributes a mystic importance to the utterances of judges and legislators. I have frequently heard lawyers refer with some asperity to Justice Temple's remarks in *Alferitz v. Borgwardt* where, referring to a certain previous decision of the Supreme Court, he says, concerning the binding force of judicial precedent:⁴

"Courts have never thought themselves bound by it as they are by a valid statute. And if it is manifestly wrong, the community does not act upon it. A lawyer who would have advised a client to rely upon the Berson case in making a loan would show his incapacity."

It has always seemed to me, however, that Justice Temple has better understood the philosophy of precedent than did Baron

⁴ (1899), 126 Cal. 201, 208, 58 Pac. 460.

Parke and his contemporaries. Indeed, American courts, in general, have regarded the matter of the binding force of judicial precedent with more common sense and more insight into the real nature of the rule *stare decisis* than have the English courts. Thus, for example, our Supreme Court of the United States has, on occasions which are matters of general history, consciously overruled former decisions as contrary to reason. The English House of Lords, on the other hand, regards itself as absolutely bound by its prior opinions. Perhaps the most extreme application of this doctrine is to be found in the case of *Beamish v. Beamish*,⁵ where Lord Campbell and the majority of the judges in the House of Lords felt themselves bound, contrary to what they believed the law to be upon the evidence of history, by the prior decision in *Regina v. Millis*,⁶ decided eighteen years before, although the last named decision resulted solely from the fact that the House was equally divided, and therefore unable to reverse the decision appealed from. Upon this tenuous and fragile basis rested the rule of the common law of England, which declared void a marriage celebrated in Ireland before a minister of the Presbyterian Church, where one of the parties belonged to the Established Church of England and the issue of such marriage illegitimate.

It is often suggested that our system of jurisprudence is now-a-days becoming mechanical, that the courts are enmeshing themselves in webs of precedent, that the great multiplication of reports is bringing about a system something like that described by Professor Calisse in his account of the medieval jurists. Doubtless there are individual lawyers and judges, doubtless there are even jurisdictions where the courts prevalently rely upon the mere marshalling of precedents, the haphazard citation of decisions, text books and compendia, for the purpose of settling the questions of law with which they have to deal. But so there are in the body politic individuals who in their habits of thought and life have not progressed beyond the medieval era,—nay, the annals of our criminal courts disclose men here and there who have not advanced beyond the intelligence and moral plane of cave-men. In such matters, we can only speak of averages, of tendencies. And it is, I think, safe to say that in most American jurisdictions today a more rational theory as to the binding force of precedent gen-

⁵ (1861), 9 H. L. C. 274.

⁶ (1843), 10 Cl. & F. 534.

erally obtains than that held by the British House of Lords. The very multiplication of authority tends to impair to some extent its force, especially where the decisions in various jurisdictions are inconsistent and conflicting. The better class of modern lawyers and judges have, in part from the very copiousness of authority, come to regard precedent as their servant and not as their master, as presumptive evidence of what the law is rather than as absolutely conclusive evidence.

"The value of these reports to the judge," says Judge John F. Dillon,⁷ "is absolutely incalculable. It is a mine of wealth possessed by none but English speaking peoples. Here the lawyer finds his true riches. What the art collections in the Vatican, in the Tribune Room, in the Pinacothek, in the Dresden gallery and in the Louvre, are to the artist, the judicial reports are to the English and American lawyer. I yield to none in my estimate of the store of riches they contain. I have not yet mentioned one of the chief elements of their possible usefulness. They are capable of being made quite as valuable to the legislator as to the lawyer, since the uninterrupted light of the experience of many generations of men shines forth from them to mark out and illumine the legislator's pathway. He need scarcely take a single step in the dark."

It is interesting to observe that while the American lawyer and judge, through the very wealth of precedent, is beginning to deal with the rule of *stare decisis* in a more liberal spirit than of old, the continental lawyer is beginning to employ judicial decisions with greater freedom than formerly. The decisions of the Supreme Court of the German Empire and of the constituent states are now published in somewhat the same manner as the Reporter System. Not long since, I heard a lawyer, a Socialist member of the Reichstag, argue before a Berlin court the question as to what was a lawful assembly, and I was surprised to hear that most of his argument rested upon decisions of the courts of the various states of the German Empire, and that it did not differ essentially from the sort of legal argument one hears every day in our own tribunals.

If we have in many instances abandoned the theory of Baron Parke, that a written authority, though unknown to the public, is binding upon succeeding judges, it must be admitted that we

⁷ Dillon, *The Laws and Jurisprudence of England and America*, 234.

sometimes unconsciously revert to the view that precedent must constitute the law, regardless of the nature and character of the principles involved. Our lamented late Chief Justice more than once pointed out that, in mere matters of practice, especially where the rule of a decision foreclosed an investigation of a case upon its merits, the doctrine of *stare decisis* should not be followed.⁸ He uniformly dissented from orders dismissing appeals because they were prematurely taken, basing his dissent upon the ground that the court was wrong originally in holding that such appeals should be dismissed, and refusing to admit that the principle was established by former decisions, because in matters of pleading and practice he maintained the rule of *stare decisis* should not be followed where its only effect would be to give a party an unjust advantage in precluding the hearing of a case upon its merits.⁹ No man, he thought, should have a vested right in maintaining an unjust or merely technical position, by reason of the fact that the court had once sustained such a position. It is in such glimpses as these of profoundest insight into the real nature of law, it seems to me, that the legal genius of our revered Chief Justice shines out. He had so lived that justice through law had become an eternal part of his being, and he seemed the very embodiment of the living law.

Perhaps there are fields other than that of procedure where the doctrine of the binding force of judicial precedents may well be diminished. The field of constitutional interpretation would seem to be one of these. I have been told that the Supreme Court of the United States no longer follows the constitution but has adopted Mr. Dooley's ideas. It would seem to me that the more recent decisions of that court under the Fourteenth Amendment are, on the whole, getting nearer to the reasonable construction of the language of that famous amendment than did their predecessors. That it is depriving a banker of his property or liberty without due process of law to make him a guarantor of other bankers in his state would seem to require a very peculiar construction to be placed upon the words "deprive," "property," "liberty," and "due process of law." We may not personally like that sort of a

⁸ Bell v. Staacke (1902), 137 Cal. 307, 309, 70 Pac. 171.

⁹ Chief Justice Beatty says, in Bell v. Staacke: "A rule of procedure which is founded upon a misconstruction of a statute and which operates only as an obstacle to the consideration of causes upon their merits is not protected by the principle of *stare decisis*."

law, and it may be very foolish from an economic standpoint, but it would be stretching the meaning of language to hold that the Fourteenth Amendment was ever intended to embrace such a case. If former opinions justified the conclusion that the words of the amendment forbade a state from committing economic suicide, then let us do as did the Italian humanists in the fifteenth century, go back to the sources, disregard comments and read the original. If some lawyers criticize the court for its reversal of views concerning the police power with respect to the "property" clause in the Fourteenth Amendment, a very respectable body both of lawyers and laymen criticize it, and with far more reason, it is submitted, for its attitude on the "liberty" clause in the same amendment. It may be very desirable—I do not say that it is—that a baker should have the right to work as long as he pleases, or that an employer should have the right to discharge a workman because he belongs to a labor union, but to hold that these rights are guaranteed by that clause of the Constitution that says that a man shall not be deprived of life, liberty, or property, without due process of law, is putting a very strange construction upon the word "liberty," especially considering its context. One would think that in the phrase respecting deprivation of "life, liberty or property," "liberty" merely meant freedom from constraint, but the authorities hold otherwise. The whole battle between the majority and the minority of the court upon this crucial question hinges in its ultimate analysis upon the question whether or not the rule of *stare decisis* should be followed in all of its consequences. The rule of the binding force of precedent should have, it is submitted, less force in this class of cases than in almost any other. It seems absurd to claim that one has acquired rights relying upon the unconstitutionality of a statute; it is a very different thing, of course, where he has acquired rights relying upon its constitutionality. In passing, it may be of interest to note that by virtue of the recent amendment to the Judicial Code which allows writs of error to the state courts, even though they decide in favor of a right claimed under the federal Constitution,¹⁰ it is probable that a large amount of state legislation, usually regarded as killed by decisions of state supreme courts, may become suddenly animated. For example, who can say that the United States Supreme Court would necessarily sustain the

¹⁰ 1914-15 U. S. Public Statutes, 790.

view of the unconstitutionality of the statutory provision respecting attorneys' fees in mechanics' lien suits, laid down in *Builders Supply Company v. O'Connor*? At any rate the question is now open for review by that tribunal. I have no doubt that much important legislation, particularly social legislation, is given life by this modest amendment, which seems to have attracted but little public comment.

In the field of substantive law, nothing can be more important than that the principle of *stare decisis* should be scrupulously observed. It is, like that of prescription, fundamental. Nor is the principle lightly to be disregarded in any field. "Imitation of the past," says Justice Holmes, "until we have a clear reason for change, no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different thing we want." "Doubt as to the value of some of these rules is no sufficient reason why they should not be followed by the courts. Legislation gives notice at least if it makes a change."¹¹ Only let us remember that the judicial precedent is not a sacro-sanct thing; it is, after all, but a human contrivance, and like all human contrivances may have been originally imperfect, and even though originally fitted for use, may have become outworn.

Closely connected with the theory of *stare decisis* is that of statutory interpretation. Neither theory seems, in the present state of legal science, to be capable of precise statement. The German Civil Code of 1900, for example, the most scientific and carefully wrought out code of law in existence, does not profess to state the principles which should govern its interpretation. The hope that the rules of law may be expressed in small compass and clear language so as to obviate the need of interpretation is chimerical. The best constructed statute or document will require interpretation, though as Professor Pound has pointed out, there is a difference between genuine interpretation which merely discovers the meaning of a statute, and spurious interpretation which is really legislation masking under the guise of judicial action.¹² A piece of work like the German Civil Code or on a smaller scale, the English Partnership Act, or the American Uniform Sales of Goods Act, minimizes the work of the

¹¹ Review of Holdsworth's History of English Law, 25 Law Quarterly Review, 412.

¹² 7 Columbia Law Review, 379.

courts in supplying deficiencies and confines their labors to true interpretation. Our own Civil Code, on the other hand, is by no means a piece of legislation which confines the courts to the field of genuine interpretation. The student who should approach his study of law through the Civil Code would wholly fail to grasp the fundamental features of our system. Take, for example, the matter of water rights, a field of the utmost importance. He would find no trace in the Code of the doctrine of riparian rights; the information he would gain as to the doctrine of appropriation would be almost negligible, and for the most part erroneous. He would find no sections dealing with percolating or surface waters. In short, if he would learn anything substantial concerning our system of water law, he would be obliged to go to the law reports. That branch of the law is of necessity judge-made, for the legislature has not acted upon the subject.

But not only have our courts been obliged by the process of judicial law-making to supply the omissions of the legislature, they have also been obliged, in the interests of justice, to construe sections of the code in a manner which may be called spurious interpretation, but which, so long as the true principles of legislation are neglected by our legislatures, will remain a continuing necessity. For example, the Civil Code not only enumerates the cases in which covenants run with the land, but provides in section 1461, that "the only covenants which run with the land are those specified in this title." Yet the law of California recognizes the doctrines of equity with respect to the running of covenants, and the courts enjoin breaches by assignees of the land of covenants not among those specified in the title. In fact, the whole matter of equity is practically unaffected by the code, although it purports to state the entire law.

Even where statutes are more carefully constructed than our hastily constructed Civil Code, even in such pieces of legislation as the Sales Act, the process of interpretation requires more than a literal reading of the words of a statute. Some remarks of Professor James Bradley Thayer concerning the parol evidence rule are pertinent to the matter of statutory interpretation because of the shortcomings of language to express thought. He refers to "that lawyers' Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purpose, not only with accuracy but with fullness; and where, if the writer

has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text and answer all questions without raising his eyes. Men have dreamed of attaining for their solemn muniments of title such an absolute security; and some degree of security they have compassed by giving strict definitions and technical meanings to words and phrases, and by rigid rules of construction. But the fatal necessity of looking outside the text in order to identify persons and things, tends steadily to destroy such illusions and to reveal the essential imperfection of language, whether written or spoken."¹³

Sound interpretation demands not only a knowledge of the history of doctrines, a knowledge of the conditions which gave birth to the legislation, but also a knowledge of social needs, of the conditions now existing. The statute must be viewed as a part of a whole, and not as a separate and independent creation. One of the greatest dangers in the modern tendency to withdraw from the courts matters of a semi-administrative character and to lodge them in special tribunals probably lies in the fact that such tribunals are very prone to adopt a narrow and technical reading of the law which it is their duty to interpret. The layman is very apt to stick to the letter, to disregard the spirit and intention of the statute. In his worship of technicality, despite his disavowals, he frequently "out-Herods Herod." If called upon to apply the famous statute, of which Blackstone speaks, which decreed a punishment for anyone who let blood on the streets of Bologna, he would probably hold the surgeon guilty who should bleed an injured patient. Very learned and respectable courts, however, have sometimes interpreted statutes in the same spirit. Witness the interpretation given by the Massachusetts court to the bigamy statute in *Commonwealth v. Mash*,¹⁴ and followed by our court in *People v. Hartman*,¹⁵ to the effect that a bona fide belief that he was a single man, did not excuse one from punishment under a statute providing that "Every person, having a husband or wife living, who marries any other person, is guilty of bigamy," where in fact, he had a former wife living. The opinion of the United States Supreme Court in the *Standard Oil* case which read into the penal statute the "rule of reason" seems to be based on a more just view as to the essential nature of

¹³ Thayer, *Preliminary Treatise on the Law of Evidence*, 428-9.

¹⁴ (1844), 7 Met. 472.

¹⁵ (1900), 130 Cal. 487, 62 Pac. 823.

criminal intent.¹⁶ Cases such as *Commonwealth v. Mash*, and *People v. Hartman*, rest upon a theory of legislation which imputes to the legislative body a perfection and completeness of expression that is not usually found in legislatures or in human affairs generally. As a matter of fact, as everyone knows, legislative expressions usually fall very far short of stating the totality of conditions.

The increasing mass of legislation, usually crudely prepared and imperfectly expressed, is constantly placing upon courts a larger burden in respect to interpretation. It may be that in a more perfectly adjusted system of government the field of interpretation would be narrower than it now is, and it may be desirable that such should be the case. But the fact remains that the tendency is at the present time in the direction of increasing rather than diminishing this function. Professor Pound, a critic of so called spurious interpretation, says, in his very interesting paper on the subject:

"Courts must decide cases; they must decide them in accord with the moral sense of the community so far as they are free to do so. If the proper agencies of government do not supply the necessary rules, they must administer justice without rules or must make rules. Granting this, the fact remains that there should be no such necessity, or at least it should be reduced to a minimum in the modern state. Over-rigid constitutions, carelessly drawn statutes, and legislative indifference toward purely legal questions are not permanently remedied by wrenching the judicial system to obviate their mischievous effects. As the sins of the judicial department are compelling an era of executive justice, the sins of popular and legislative law-making are threatening to compel a return to an era of judicial law-making. Both are out of place in a modern state."¹⁷

It is perhaps unnecessary before an assembly of lawyers to dwell upon the evils of over much legislation, to call attention to legislative inconsistencies, to point out how the introduction of direct legislation has complicated the problems of the law, regarded merely from the professional point of view. We are accustomed to think of the British Parliament as rather a superior legislative assembly, and we know that for many years the acts passed by that Parliament have had the advantage of being drafted by

¹⁶ (1911), 221 U. S. 1, 55 L. Ed. 619, 31 Sup. Ct. Rep. 502.

¹⁷ 7 Columbia Law Review, 386.

skilled lawyers employed as legislative draftsmen. And yet Sir Courtenay Ilbert, for a long time parliamentary counsel, and now clerk of the House of Commons, has this anecdote to tell us about the Mutiny Act, which you may remember was an act first passed at the beginning of the eighteenth century, providing for the support and maintenance of the standing army, and which, because of the fear entertained by Englishmen of such establishments being used by the executive against the liberty of the country, was passed annually by Parliament. With true British inconsequentialism, the army part of the act was a "rider" to a bill respecting the suppression of mutinies. Sir Courtenay Ilbert says:

"For many generations nobody thought of reading the Mutiny Acts. They were in the old form, and everybody took it for granted that they were all right and merely reproduced the existing law. You may perhaps know that each Mutiny Act used to come into operation, as the Army Act still does, at different times in different parts of the world. And I remember discovering in one of the very last of them a provision that it should come into operation at a specified date in Spain and Portugal. This provision had been inserted at the time of the Peninsular War, and like the sentry in front of the guarded flower in the old Russian story, had remained unnoticed ever since. Nobody had taken the trouble, or had thought it worth while, to strike it out, and there it stuck till near the end of the nineteenth century."¹⁸

And Sir Frederick Pollock picturesquely describes the process of modern law-making in language which is even more true for our own country than for his.

"Many an act of Parliament, originally prepared with the greatest care and skill and introduced under the most favorable circumstances, does not become law till it has been made a thing of shreds and patches hardly recognizable by its author, and to any one with an eye for the clothing of ideas in comely words, no less ludicrous an object than the ragged pilgrims described by Bunyan: 'They go not uprightly, but all awry with their feet; one shoe goes inward, another outward, and their hosen out behind, there a rag and there a rent to the disparagement of the Lord'. "¹⁹

If such be the work of the best of legislative bodies, what shall we say of the work of most of our American legislatures!

¹⁸ The Mechanics of Law Making, 107.

¹⁹ Some Defects of Our Commercial Law, in *Essays on Jurisprudence and Ethics*, 80.

In the chaos and welter of legislation, how is the lawyer whose duty it is in the first place to interpret the laws, how is the judge upon whom is laid the ultimate pronouncement as to their meaning, to guide his course? He must be able in some way to cultivate an instinct by which he can select from the mass of so-called law-making that which is really law from that which is not. Rules of thumb cannot carry him far. The education gained from his knowledge of the world, from his feeling for right, from his acquaintance with the history of his legal system, must give him that instinct. The legislature cannot altogether make law any more than can the courts. Nay, even the sovereign people are not altogether absolute. The natural and social forces that govern man are the living springs from which the law derives its being. You can pass usury laws until the statute books burst and you will still have usury with you in some form; you can enact eugenic laws from now till doomsday, but I doubt whether you will eradicate deformity and misery. When a rule ceases to be adapted to social conditions, it ceases to have legal effect. For example, theoretically the action for criminal conversation, or damages for alienation of a wife's affections, the kind of action in which Curran first achieved his great reputation as an advocate in the Marquis of Headfort's case, and in which the late Lord Chief Justice Russell of Killowen shone at his best when at the bar, exists in California, but I doubt whether anyone in this room would advise the beginning of such an action. I do not know of any statute in this state abolishing distress for rent, but I shouldn't care to try to collect rent by that means. The legal history of our state is full of examples of active principles of law created by social and economic conditions. Our mining and water laws at once occur to the mind. But not less characteristic are many rules dealing with fundamental rights. Our law of self-defense, our law of costs, which tends to discourage actions for torts where the injury is slight, our liberal homestead and exemption statutes, our laws forbidding creation of limited liability companies, all throw a vivid light upon our social and industrial life. A very great law teacher of the last generation said that "all the available materials of the science of law are contained in printed books."²⁰ I think that almost any practitioner would deny this. The

²⁰ C. C. Langdell, quoted in Redlich, *The Case Method in American Law Schools*, Bulletin No. 8 of the Carnegie Foundation for the Advancement of Teaching, 15.

distinguished lawyers and judges who in our pioneer history first laid down the law respecting the appropriation of waters certainly did not extract their principles from printed books, but had read rather deeply in the great book of human nature.

I am not defending a system or a theory of law by which, in some mysterious way, courts and lawyers are to discover the views of what is right according to dominant public opinion and are to conform existing legal institutions to these views. That would be the negation of law, whose very essence is form. Bagehot says: "An ill-knit nation which does not recognize paternity as a legal relation would be conquered like a mob by any other nation which had a vestige or a beginning of the *patria potestas*."²¹ And what is true in primitive society and in a fundamental personal relation, is equally true today and in the most complex relations. A modern nation which becomes lax in the enforcement of contracts or the protection of property is sure to retrograde in civilization. But when we speak of property we do not necessarily mean absolute private property. An absolute right of property in every individual, says von Ihering, would result in the dissolution of society.²² Every man's hand would be against every other man's. Property only exists as an active principle by virtue of the state and the protection which the state throws about it.

In the modern law regarding such fundamental legal conceptions as property, we see the changing view of law. The English courts of the first half of the nineteenth century, many American courts of even a later era, perhaps some even at the present day, were coming to regard rights of property as in their nature absolute and unyielding. The student of English legal history cannot fail to notice how, for a long period, the dominant public opinion which directed the development of the law was that dictated by the landed interest. How otherwise can such an anomaly in the law of fixtures be explained as that in the case of agricultural lands, the doctrine of trade fixtures did not apply? Originally all fixtures belonged to the landlord absolutely, and in fact, originally, the leasehold as a protected legal institution did not exist. As soon as England became to some extent a commercial country, almost as soon as the leasehold interest gained full protection, the trading classes obtained for themselves the right to remove trade fixtures. The innovation, however, was not extended to

²¹ Physics and Politics, 124.

²² Cited in Ely, Property and Contract, I, 137.

agricultural tenants in England, until well along in the nineteenth century the matter was taken up by Parliament, though in democratic America the courts refused to follow the distinction between trade and agriculture. Land was never, so long as the landed classes held their undoubted sway, subject to execution for debts. It was not until the commercial interests had displaced the landed influence that the modern law on this subject became fixed in its present form. Property became more fluid as the men of commerce became more influential, and the medieval legal system which rested upon the law of real property and status as its bases was supplanted by a system which rested upon contract. The theory of our law came to be that men had the right to regulate their conditions exactly as they pleased by contract. But here too the theory of the absolute right of contract, just as the previous theory of the absolute right of individual property, began to yield to the demands of altered public opinion. The history of modern English and American law is in large part the story of the limitations that have been placed upon the absolute principles of property and of contract in the interests of society. Abolition of imprisonment for debt, homestead and other exemptions, bankruptcy and insolvency laws, are examples of the departure of the modern law from the principle of absolute obligation in the law of contracts. On the other hand, the advancing moral sense of the community has, in other respects, fortified and strengthened the duty of keeping faith by improving methods of enforcing obligations. The remedy of specific performance has, especially in England, been so extended that the court may decree specific relief in any case where it is deemed just, irrespective of technical limitations. Moreover, the tendency indicated in many jurisdictions of awarding the contract price in cases of breaches of executory contracts for the sale of goods, makes the risk attendant upon a breach much more considerable, and directly contributes to the keeping of one's word. So, also, the modern doctrines with regard to anticipatory breach and with respect to the mutual dependency of conditions in contracts. The conception of individual rights which recognized a right to break a contract has been entirely supplanted by a more social view of contractual relations. Again, in the field of torts, the idea that liability should, in general, be dependent only upon fault was wrought out in the history of our law only after centuries of debate and discussion. Yet hardly had this principle been settled

than the increasing complexity of modern industry has caused an extension of the so called doctrine of *res ipsa loquitur*, the introduction of such theories as that of the "last clear chance," the legislative adoption of principles of absolute liability, as in the Industrial Accidents Act,—in short, a return in part to the ancient theory of absolute responsibility.

There is not time to illustrate the altered views in relation to the vastly important questions involved in combinations of capital and labor, in relation to the reform of the criminal law, in relation to the reform of procedure and the practical administration of the law. What has been said is sufficient, I think, to show that our law is in an era of rapid transformation, an era of revolution. So rapid have been the changes that our greatest living practical jurist, Mr. Justice Holmes, has said, "To have doubted one's own first principles is the mark of a civilized man."²³ But because he may sometimes doubt his first principles, the lawyer knows that he must not abandon them merely for that reason. He knows too well that most things in this life depend upon presumptions, and he recognizes that the mere fact of the existence of a rule or an institution places upon those attacking it the burden of proof. "The science of jurisprudence, the pride of the human intellect, which with all its defects, redundancies and errors, is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns,"²⁴ as Burke terms it, is not to be abandoned because a few shallow critics exaggerate here and there a casual fault or a special instance. We know that our civilization, our most precious rights and possessions, owe their being to our law. We know that its preservation is the most important task that we as lawyers must perform. "If there is any virtue in the Common Law," says Sir Frederick Pollock, "whereby she stands for more than intellectual excellence in a special kind of learning, it is that Freedom is her sister, and in the spirit of Freedom her greatest work has ever been done. By that spirit our lady has emboldened her servants to speak the truth before kings, to restrain the tyranny of usurping license, and to carry her ideal of equal justice and ordered right into every quarter of the world. By the fire of that spirit our worship of her is touched and enlightened, and in its power, know-

²³ Ideals and Doubts, 10 Illinois Law Review, 1.

²⁴ Reflections on the French Revolution, (Little, Brown & Co. edition), III, 357.

ing that the service we render to her is freedom, we claim no inferior fellowship with our brethren of the other great faculties, the healers of the body and the comforters of the soul, the lovers of all that is highest in this world and beyond. There is no more arduous enterprise for lawful men, and none more noble than the perpetual quest of justice laid upon all of us who are pledged to serve our lady the Common Law."²⁵

Orrin K. McMurray.

²⁵ *The Genius of the Common Law*, 124-5.